**A Guidance Note:**

**Developing a Constitution Building Strategy to Create Sustainable, Legitimate Constitutions**

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A constitution can be defined as a system which establishes the fundamental rules and principles by which a state is governed. The constitution can play a number of roles but it is often thought of as a social contract setting out the rules and values that will govern power in a society, and designing its key governance institutions. Constitution Making can be considered a sub-component of Constitution Building that focuses on actually making the constitution, and begins with the decision to create, review or renew a constitution and can include dialogues and consultations, the negotiation and drafting of the provisions, and the adoption of the constitution. Constitution building can be used to refer to a broader timeframe that includes the pre-constitution making phase (leading up to the constitution making), and the post-constitution making phase (implementation and enforcement).

While it was at one time accepted and expected that constitutions would be drafted by a few lawyers or leaders in a room, without public input, it is increasingly recognized that the degree of inclusiveness and participation of the society in the process of making the constitution will impact on the resulting constitution, affecting its perceived legitimacy and its transformative power. This is of particular importance in the post-conflict or transition to democracy contexts where the constitution often seeks to define a new vision for the society and a road map to get there. This is in contrast to constitutions elaborated or reformed in stable political contexts which generally reflect a status quo or anticipate incremental change to the practical reality already in existence. The constitution that is built in a post conflict or transitional context is usually a compromise document, reflecting the fact that increasingly no side wins an outright victory in such contexts, and that the future society will need a process of ongoing balancing of interests and negotiation between opposing sides. The role of such constitutions is thus both realist, in that it reflects deals made to end the violence or permit the transition, and also aspirational, in that it reflects hopes for the future. What is termed Transitional Constitutionalism best recognizes the

multifaceted role of such constitutions as inextricably enmeshed in transformative politics both codifying the prevailing consensus, and also transforming it. Constitution Building is thus both a process and a forum for negotiation in such contexts.

The issue of how best to build constitutions in post-conflict, democratization or transition contexts is essentially a new field of study that has emerged in parallel with the increased attention being given to the role of *process* in constitution building. Although there are numerous national and international practitioners who have participated or assisted in constitution building processes, the field has not yet consolidated into a coherent or systematized area of study, and those that have undertaken this work have largely done so on the basis of trial and error. Nevertheless, there is a small and growing body of literature documenting and analyzing the constitution building processes and governance choices adopted in such constitutions, and attempting to draw from them lessons to inform those that will undertake - or advise in - future processes. This paper explores some of the lessons and draws out some of the complexities and paradoxes that constitution building faces in practice with the aim to develop some guidelines to assist in the building of sustainable and legitimate constitutions.

**The role of constitution building in the peace-building and state building context**

Both 'grand scheme' (complete writing or rewriting such as in East Timor or South Africa) and incremental reform (as in Chile or Indonesia) of constitutions can play a role in peace-building and state building in the post-conflict or democratization context. The impact derives both from the process by which the new constitution is designed and adopted, and from the institutional and governance choices adopted in the constitution.

The constitution making can arise in many different ways. Demands for a change in the constitution and the way power is shared or exercised is often one of the key demands of conflict parties, as is seen in Nepal or Sri Lanka. The re-formation of a constitution can also be included in a peace agreement as the symbolic and effective start of normalized politics, following on from a period of transition when power is either shared or allocated through an agreement between the fighting parties, such as in Afghanistan or South Africa. During transitions to democracy the review or renewal of the constitution can also usher in a new era of politics using different rules moving beyond any entrenched undemocratic provisions in the old constitution (eg Indonesia, Chile and Hungary).

**Impact of Substance**

The role of the constitution as a plan setting out the governance structures for the state and the rules by which power is to be managed is well recognized. The choices of different institutional structures – such as a power-sharing government or a majoritarian one, or the degree to which

the state is to be decentralized or centralized – and the inclusion of different values in the constitution – such as the rights of minorities or women to equal treatment – will impact on the degree to which the society is likely to return to conflict, depending on the extent to which the root causes of the conflict and interests of all members of society are adequately addressed in the models chosen.

The choice of certain provisions may result in division and bitterness in the population if the constitution is unrealistic, unenforceable (too ambitious, too expensive), or conflict inducing (eg unjust resolution of land issues, war crimes, or division of power and resources). This is not a simple correlation, however, as many factors come into play in determining how an institution or governance rule will work in a particular context, including for instance on government capacity, informal power structures, cultural or historical factors and naturally the attitude and leadership of the political leaders. In many instances the practical outcome of choosing a particular institutional option is difficult to anticipate with accuracy.

For instance, many power sharing provisions have not functioned as expected when they were incorporated into constitutions. In Fiji for instance, s99 in the 1997 Constitution which required the Prime Minister to create a cabinet that was representative of the members of the House of Representatives in consultation with the leaders of those parties, was essentially not implemented and the political deal was thus undermined. In other instances, such as Lebanon, complex power balancing provisions resulted in deadlock in government and ultimately rendered the government unable to take any policy forward. In another example, constitutional powers allocated to Presidents, which on paper have seemed similar, have in practice functioned in very different ways, resulting in both strong and weak presidential models, depending on the individual's charisma, the degree to which they have political support in congress, and their leadership style.

Moreover, the constitution will only impact on the society and the state if it is implemented and enforced. If the constitution is in essence the plan for the house, implementation is the building of the house. Without implementation, a constitution is only a symbolic piece of paper and it will have minimal positive impact on peacebuilding or democracy building in the state, and may in fact risk disappointment and disillusionment of the population. The Haitian constitution, for instance, is a progressive constitution which sets out a wide range of human rights protections, transparency and rule of law provisions, but as it has largely not been implemented or enforced, it has played little role in shaping the state or managing its violent conflict. In Afghanistan, the constitution is currently unenforceable due to a deadlock between parliament and the President on which body has the jurisdiction to enforce it, which risks rendering the entire process of design and adoption of the constitution irrelevant.

**Impact of Process**

The role that a constitutional process can play in supporting peace building essentially derives from the opportunity to broaden and deepen the range of participants involved in the negotiation and in shaping of the future of the state. This opens the door to important societal dialogue, and creates a shared vision of the future of the state without which implementation of the constitution is unlikely. In the post-conflict context the discussions will have begun in the context of the peace negotiations which will have taken place among a very limited number of actors, largely the armed actors. If the constitution building process includes public dialogues and public consultation, it can broaden the constituency that has a stake in the peace and foster general acceptance in the population that the violence has now ended and that solutions to living together must be found. This was at the basis, for instance, of the highly consultative and participatory South African process, which did achieve a largely peaceful transition in a highly divided and conflictual environment.

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**South Africa's Constitution Building Process**

After a series of unsuccessful peace negotiation attempts early 1990s, the peace process evolved in 1993 into what was known as the Multi-party Negotiating Process which involved a 208-member, 26-party, parliamentary-style plenary and a complicated structure of technical committees and sub-forums. This body brought all of the key players together and emphasized the importance of finding a largely consensus based way forward for the country – they developed the notion of "sufficient consensus" requiring agreement of the major parties and seeking as much buy-in from the others as possible. This phase lasted more than a year and resulted in an agreement on the constitution making process and the principles for the election of the members of the Constitutional Assembly, as well as a set of basic principles for the future constitution and an interim constitution.
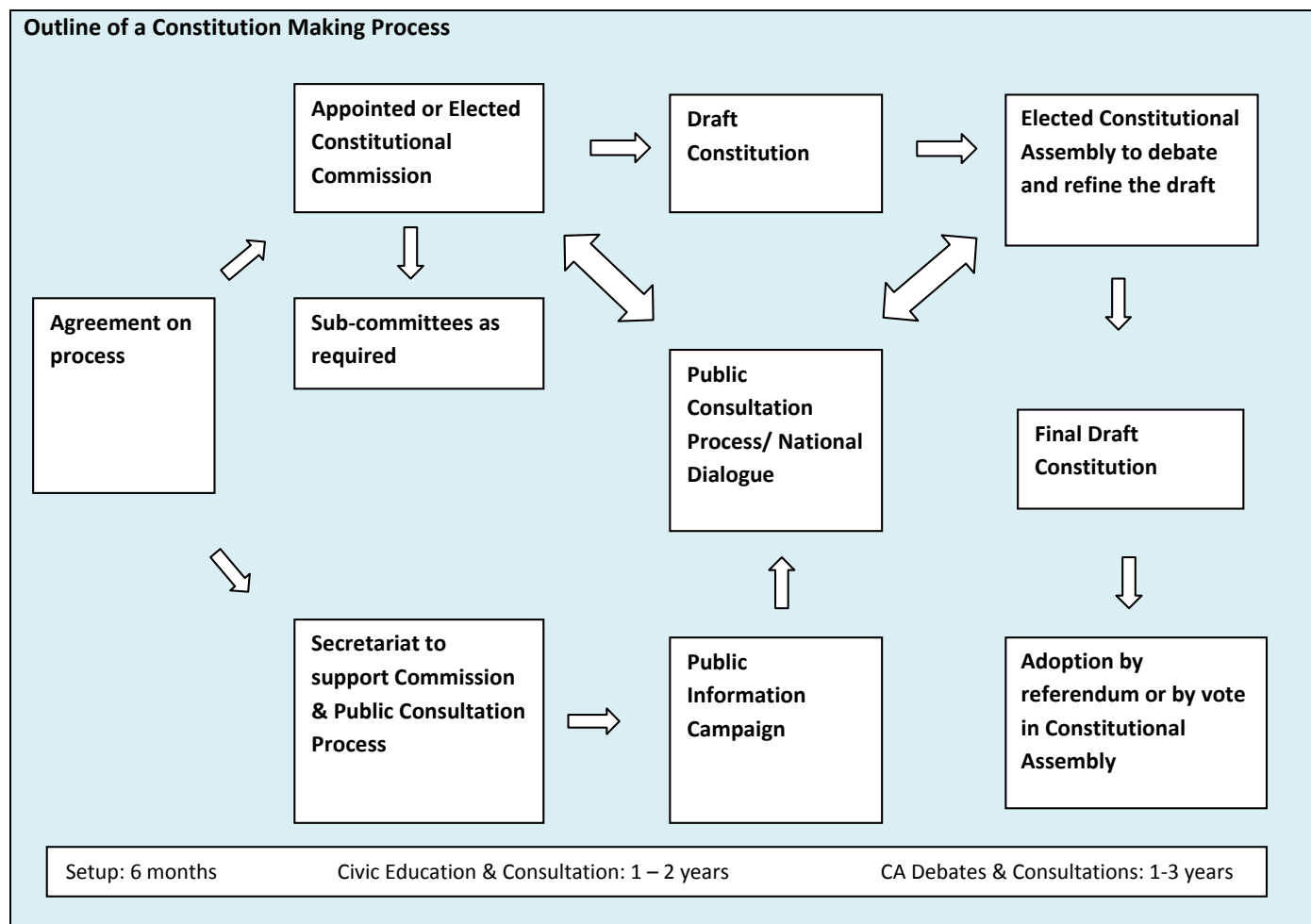
The 1994 elections for the Constitutional Assembly were based on the principle of proportionality, and the delegates were given two years to finalize a draft constitution. Three fundamental principles underpinned the approach the Constitutional Assembly took to developing the draft: inclusivity, accessibility, and transparency. It was agreed that the constitution had to be the product of all the major elements of society, and a proactive process to solicit views was implemented. Transparency was promoted by ensuring that all meetings of the Constitutional Assembly and its structures were open to the public and all materials were made accessible through the internet. A public participation programme elicited feedback on issues to be considered in the draft, a second phase involved public comments on a draft text, and a third phase of dissemination was planned for when the Constitution had been adopted. The process required more than a thousand workshops, briefings and meetings and resulted in a very large number of submissions.

> The national debate and consultations helped to legitimize the importance of democratic processes as the way to address political conflict, and surveys indicate that the majority of the population felt they had an opportunity to contribute to the constitution, a strong sense of ownership of the constitution.

In many cases, a constitution building process will be the first time that the people have been asked what sort of state and society they want to live in, and what vision they have for their future. These sorts of dialogues can play a symbolic and psychological role in healing the society, allowing some of the built up emotion and distrust to be expressed and managed while undertaking a practical task of developing strategies to deal with the day to day of running a state. In Rwanda, for instance, the constitutional commission undertook an extensive education and training campaign on the role of the constitution and then spent six months in the provinces undertaking public consultations through public meetings and questionnaires. This highly participatory process seems to have created some basis for the functioning of society after a trust shattering period of violence, even though the process of consultation was tightly controlled by the government.

The process can also provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence and forge a new consensus vision of the future of the state. In Afghanistan, a multi-step process moved from the Bohn Agreement, which only included the armed actors, to an elected Constitutional Loya Jirga (traditional assembly) of many hundreds of members representing a diverse range of interests, including women who had been wholly excluded under the Taliban. The representativeness of the body was an opportunity to fashion a new vision for the future of the state, however the exclusion of the Taliban meant that there was no opportunity to heal the deep rift that continues to divide the country.

Unsurprisingly, constitution-making processes can take a number of different forms, as appropriate to the context in which they are developed. Nonetheless, many have adopted similar steps. The diagram below provides an outline of many common elements of a constitution-making process.

**Outline of a Constitution Making Process**

| | |
|---|---|
| Appointed or Elected Constitutional Commission | Draft Constitution |
| Agreement on process | Elected Constitutional Assembly to debate and refine the draft |
| Sub-committees as required | Public Consultation Process/ National Dialogue |
| Secretariat to support Commission & Public Consultation Process | Final Draft Constitution |
| Public Information Campaign | Adoption by referendum or by vote in Constitutional Assembly |

| Setup: 6 months | Civic Education & Consultation: 1 – 2 years | CA Debates & Consultations: 1-3 years |
|---|---|---|

Representativeness of those drafting or adopting the constitution is a key factor in its perceived legitimacy. The un-representativeness of the bodies that adopted the constitutions in Venezuela, Brazil and Nigeria have had damaging consequences in the longer term, including instability, a return to conflict, and undemocratic governance structures. In Ethiopia, the lack of debate among the various political groups which were excluded from the process meant that controversial issues regarding ethnicity, self-determination and federalism were never adequately deliberated and continue to destabilize the country. In contrast, the representativeness of the bargaining group is considered to have assisted Spain, Hungary, and South Africa's transitions from conflict.

Moreover, if a constitution building process is undertaken poorly through an exclusionary, provocative or inflammatory process, or the consultations are not genuine, it can undermine the creation of sustainable peace and a legitimate state. If the process does not explicitly seek to create consensus, or the public education campaign or public dialogue adopts extremist views

rather than encouraging moderation and compromise, it could inflame divisions. For example, the Iraq process was supposed to facilitate a transition from an appointed interim government to an elected constitutional assembly to broaden the voices heard and legitimate the resulting governance choices. In that case, however, the context of the war, occupancy, insurgency, and boycotting of the elections by the Sunni population resulted in a highly unbalanced assembly which was unable to bring the country together.

The table below summarizes different functions and roles that constitution building can play in post conflict or transition to democracy contexts.

| Substance | Process |
|---|---|
| A constitution can typically have a number of functions, including: | A constitution building *process* in a post conflict, transition to democracy context can also play a number of additional roles: |
| 1) Set out the key values of a society; | 1) Bring fragmented elements of a state together to think about a future vision of the state and a road map on how to get there |
| 2) Create a framework for government and society to operate within; | 2) Provide a symbolic break with the past; |
| 3) Choose the rules by which power and resources are to be divided; | 3) Create an expectation that new phase is about to begin peacefully; |
| 4) Decide how those that govern are going to be chosen; | 4) If it is inclusive and participatory, it can help legitimize the government; |
| 5) Create rules to regulate how resources are to be managed; | 5) Provide a forum for national dialogue and negotiations of divisive issues; |
| 6) Set out the rights and duties of citizens; | 6) Continue the peace building process that began with the peace negotiations, especially at a more grass roots level; |
| 7) Enshrine and protect minority rights; | |
| 8) Create a framework of institutions that seek to ensure that these rules and decisions are operationalized and sustainable; | 7) Play a psychological role in developing a sense of nation by including citizens in developing a common vision for their country; and |
| 9) Create mechanisms to manage conflicts over resources, values, rights or power in a non violent fashion, and | |

| | |
|---|---|
| 10) Shape future governance of state by creating institutions that support peace and democracy. | 8) Provide basic democratic education to the population. |

## A Problem Solving Approach to Constitution Building

Often a constitution building process seeks to address social, economic, or political problems. It is essential to begin from an understanding of what the problems are that are sought to be addressed through the constitutional process, and their nature and causes. At the same time, it is important to adopt a realistic attitude to what any law, even a fundamental law like a constitution, can achieve.

There are inherent limitations to constitutional engineering. Any attempt to change basic system rules in society through constitutional or institutional reform faces considerable challenges, particularly path-dependency, political transaction costs, and inertia. Therefore, expectations must be realistic. It would be unreasonable to expect constitutional reform to overcome long entrenched informal and institutional practices unless there is substantial domestic support for the changes. Nevertheless, the design of new rules can, when accompanied by appropriate incentives, set a new agenda, change the rules of the game, and begin a process of reform.

In order to do so, it is essential to tailor the solutions to the particular context. An important distinction therefore needs to be drawn between constitutions and constitution review or renewal in the developed world, and the constitutions, and constitution building, in the post-conflict and transition to democracy contexts. While it is widely accepted in the development field that every context is different, that cookie-cutter approaches have not worked, and that each solution must be tailored to the particular country in consideration, this is often overlooked in practice.

Attempts to transfer models, lessons and institutional structures from stable and developed societies to conflict and transition to democracy contexts should be approached with caution. These highly divided and complex contexts, have very different institutional and social environments to stable and developed societies which go to the core of the likelihood of implementation and enforcement of a constitution. The differences frequently include a weak or mistrusted legal and judicial structure, recent experience with the misuse of power, and low bureaucratic capacity, and informal criminalized or traditional structures which are likely to compete with any new institutions or rules adopted in the constitution.

In Somalia for instance, the history of power use shaped the choice of institutions and rules, and the extent to which a population would understand and embrace them. The population's experience of a state had been through colonial occupation, followed, after 9 years of tentative

democracy, by the repressive and rapacious dictatorship of Siyad Barre. The state had historically been an instrument of accumulation and domination, enriching those that control it and causing repression and exploitation of the rest of the population. During the cold war when the state was practically entirely externally funded there was a large patronage and graft network linked to being in government or the administration of the state. The state was thus the primary source of power and wealth – a catchment point for foreign aid, control of government contracts, and power to expropriate property of others. When a constitution drafting process was initiated in 2006, Somalis (other than those in Somaliland and Puntland) had lived without a state for fifteen years. Sixty to seventy percent of the population had grown up with no experience of state governance. Their perception of what powers a state should have had been strongly shaped by this history. In interviews on the design of the constitution some Somalis maintained that while they did want a state they didn't want one that had anything to do with them.

Many governance structures that have worked well in the developed world, for instance a legislature playing a 'balance of power' role to an executive government, have been substantially subverted or rendered ineffective in countries with strong informal or criminalized structures, strong tribal or ethnic divisions, or simply weak and inexperienced members of parliament. In East Timor for instance, an inexperienced parliament, which had not drafted legislation or shaped policy before, and was hampered by language difficulties (many could not read in the new official language of Portuguese) resulted in an over-dominant executive which operated essentially without checks and balances.

System that work well in a wealthy and educated state may not function well in one that is poor and illiterate. The adoption of a complex electoral model based on a Single Transferable Vote modality in Fiji, is, in retrospect, thought to have been too complicated and difficult to understand by the voters and have resulted in unexpected and unintended electoral results. Another example are the complex and multi-layered decentralization models which in practice require a lot of capacity and are expensive to implement, and therefore only exist on paper (as seen in many states in Africa and Latin America). Even in a state with as much capacity as India, the complex and multi-layered decentralization mechanisms that go all the way down to the village level Panchayat have required ,and continue to require, many years of capacity building to implement.

In summary, key features of context that raises particular challenges and must be carefully taken into account when designing a constitution building process and constitution include:

- A highly divided society and deep lack of trust between parties;

- An environment with few existing-or functioning institutions and / or little experience with a peaceful state or democracy;

- An excluded, and/or poorly literature population;

- Disorganized and weak civil society;

- Weak rule of law;

- An entrenched war economy;

- A set of informal mechanisms which have allowed the society to function during the crisis, some of which are traditional and some of which are criminalized, and are likely to compete with new institutions.

**Constitution Building and societal transformation**

It is also essential to recognize that the challenges facing societies undergoing transition are not simply rational and structural, and that putting in place elections, designing new institutions and choosing the best constitutional language will not necessarily result in conditions for peace and stability. A society is built of individuals and their leaders and is shaped by their capabilities and perceptions as conditioned by their experiences and often conflictual and violent histories. Societal transformation therefore, requires the transformation of attitudes and perceptions of individuals and leaders in the society.

It is increasingly recognized, for instance, that elections are very divisive and conflict provoking democratic instruments, that can put minorities at risk and that can entrench divisions and heighten conflict, in societies where there is no underlying agreement about the fairness of the political process. This was recently seen in Kenya for instance, where the election resulted in serious violence, and it was clear that much turns on the attitude and messages of the political leadership and the extent to which they take a collaborative or competitive approach to politics.

As Howard Wolpe has explored through his work,[i] it is essential to recognize that democracy is built on a network of consensual agreements, about the nature of the society as one nation, the rules of the political game, the predictability of behavior of key political leaders of the society, and an understanding that those elected are expected to act in the best interest of the society as a whole and not only their own or those of their tribe or class. In this context, the aggression and combativeness of a competitive electoral process can be absorbed by the society without resulting in societal breakdown or instability. Therefore, a key challenge of constitution building

should be to support the leaders and the society to move beyond a confrontation view of their interests and build recognition of interdependence and the value of collaboration with the opposing group as a matter of enlightened self-interest to ensure the peace and stability of the country.

**Some Key Paradoxes and Compromises**

Considering the complexity of the state building and peace-building goals sought to be achieved, the very high stakes and societal expectations, and the extremely challenging contexts reviewed above, it is no surprise that the creation of a constitution building strategy requires the balancing of very difficult and often contradictory influences.

*Short term goals and longer term peace and security*

There exists a fundamental tension between designing a constitution that achieves short term peace and one that achieves longer term peace and democracy. In the postwar or transitional context, the competing interests and compromises faced are heightened, and can easily undermine a fragile peace or democracy. A challenge for many constitution building processes has been to create a vision that is greater than short term politics. While in South Africa, for instance, the leaders were able to move beyond the immediate crisis through statesmanship and vision, in Kenya, short term politics dominated the process, and resulted in a highly divisive and politicized process, and a constitution that was ultimately rejected at referendum.

One example, involves the adoption of power sharing models of governance. While these are often fundamental to ending the violence, they are also known to contribute to entrenching and reinforcing divisions and perceptions of rivalry and threat in society in the longer term. They can also contribute to the radicalization of politics when moderate leaders that have agreed to participate in power-sharing arrangements are undermined by more extreme factions that oppose the compromises or conciliatory actions. While governments of national unity and power-sharing models have successfully maintained peaceful relations in Switzerland, Belgium or the Netherlands, they have not been successful in Fiji or Lebanon, and their success is disputed in Bosnia. Northern Ireland may emerge as a counter example, however it is a relatively highly developed country and it remains to be seen how its power sharing model will function over the years.

*Inclusivity and elite accommodation*

Another issue turns on the degree of inclusivity of the negotiations and the degree to which the military or political elite will support a constitution that has broad popular involvement. To end the war, the peace agreement will generally focus on the interests and demands of the armed actors, and if a constitutional process is undertaken too soon after the end of the war, it is likely

to entrench these agreements, which may not be representative of the wishes of the broader population. Consider for instance, the issue of dealing with the past and justice for war crimes. The armed actors will not want to face possible punishment before the law or even a demand for compensation, but the victims and civilian population may need such mechanisms to overcome a culture of violence, fear, and impunity and build a democratic and peaceful society.

Similarly, in democratizing contexts, the demands of the broader society for judicial reform, greater accountability of politicians or other restrictions on the power of government may be contrary to the interests of the military or political elite that will play a key role in enforcing the constitution once adopted. This sort of tension can be seen in the Colombia process and more recently in the Kenyan process. In the latter case, after a highly participatory process, the resulting constitution became a threat to the elite political class, whose zeal for reform disappeared once they replaced President Moi in power. They reacted by undermining the process and have been so successful that no constitution has yet been adopted.

*Need for urgency and unrealistic timeframes*

An additional difficult paradox exists between the urgency of adopting some constitutional framework to give legitimacy to the new government, and signal the start of a new phase of peaceful and democratic governance, and the difficulties created by rushed or internationally driven processes, which often result in unrealistically short timeframes that undermine the possibility of consultation and consensus building around the new constitution, as in East Timor for instance, and also the risk discussed above of entrenching in a new constitution the divisions and compromises emerging from the conflict. An advantage of a staged process can be that a transition can be made from early agreements, which focus more on what is required for immediate cessation of the conflict, to later more representative and participatory discussions of what sort of state the people want. Another option is to adopt an interim constitution with a long but limited time frame (eg 10 years) with built in review phases, which may be able to create a political space where new ideas and leaders can emerge.

*Aspiration and the reality of implementation*

There is a tension between creating a constitution that is aspirational, and imagines the society functioning according to democratic principles, incorporating human rights protections and strong rule of law, and creating a document that can be implemented and enforced. In practice it is implementation that is the most difficult and least well understood phase of constitution building. Evidently any attempt to change basic system rules in society through constitutional or institutional reform faces considerable implementation challenges, including path-dependency, political transaction costs, and inertia. In the contexts we are considering, this can be compounded by problems of weak rule of law, rapacious elites, a lack of political will, the

inadequacy of funds to create the institutions or train those required, and the lack of international community follow-through after the adoption of the constitution. In essence, constitutional reform alone will not overcome long entrenched informal and institutional practices unless there is substantial domestic support for the changes.

*Creating consensus and inflaming divisions*

The opportunity to achieve reconciliation over divisive issues through public dialogue, or building consensus around the adoption of particular solutions or mechanisms to resolve or manage the conflict, must be balanced with the risks of the process becoming unduly divisive or inflamed and aggravating the conflict or preventing the constitution from being adopted. In Indonesia an earlier constitutional reform process was brought to a halt over disagreements surrounding how to deal with religion. However, avoiding the most divisive issues does not assure a smooth process either, as seen in Ethiopia.

One strategy is to ensure that it is clear to all participating how deeply divisive issues will be addressed. Some options, if a reasonable consensus cannot be reached, include: adopting a compromise solution if the matter is minor or providing in the constitution that the issue will be explored further through an appointed commission if it is likely to require ongoing debate and negotiations, or agreeing on a broad principle and leaving details for later consideration. Such a notion of 'gradualism' can be useful for dealing with issues that would prove overly contentious and divisive.

*Seeking input and managing expectations*

One point to note is that there is a difficult balance to achieve when seeking input from the general population on the constitution, in recognizing the importance of a new vision for the society, and managing expectations on what a constitution can achieve, and it should address explicitly. Consultations often result in requests, for instance, that a constitution include detailed provisions promising higher income, better education and health care, or include infrastructure plans such as building of particular roads or other development improvements.

*Local solutions and comparative and international experience*

There is also an important tension to recognize between the need for local or endogenous solutions to local problems, and the learning that can come from international expertise and experiences. It is important to recognize that there often exists a divergence between local ideas and values and a western Westphalian vision of a state, and often the institutions created are not sustainable when the international community leaves. To be successful the institutions cannot be mere shells imposed from outside, but must be bodies that are able and committed to performing their core function.

One area where the issue arises in a stark fashion is in the context of informal structures. In many developing countries and most post-conflict countries, a stark division arises between the formal power structures and the reality of power on the ground. Even during an armed conflict, although the formal governance mechanisms may not have functioned, alternative mechanisms, informal or traditional, will have more or less managed power, dealt with disputes, and sought to ensure a minimum of predictability and governance for their population. In practice, such structures may range from traditional leaders, such as chiefs, or councils of elders, to warlords who have taken control over a particular territory during a conflict. They will vary in legitimacy, popular support, and congruence with a democratic transition.

Whether or not a decision is made to include specific provisions in the constitution to recognize local power structures, modify them, or seek to override them, it is clear that in practice their existence will must be taken into account, or it could dramatically undermine the ability to implement the constitution. This does not mean that all traditional or informal structures should automatically be formalized or recognized in a Constitution. In some cases, it may be possible to maintain two spheres – one formal and one informal – that function in their own areas of responsibility. In other cases, the traditional or informal structures can be recognized but modified to bring them more in line with a democratic or 'modern' state vision, and the hope will be that the practice will slowly come to conform with rules described in the constitution. In other cases, the attempt to dissolve or ignore traditional or informal mechanisms that have functioned more or less effectively for the population, and that are well known to them, can lead to a situation of chaos where the new structures are not trusted and are not understood and yet the informal approaches are also undermined, leaving the society worse off than they were before the reforms.

At the same time, moving beyond the local experiences and drawing on international experiences that have sought to address similar issues can be helpful in designing institutions or governance solutions for the country in question. This is particularly the case when the international experience is presented in a balanced and clear fashion with an understanding of what has worked and hasn't work in that context, and some insight into how that context is different to that of the country in question. One of the difficulties, however, is that often institutions or constitutional provisions are imported wholesale into constitutions with little understanding of how they have functioned in the original context, or how they will interact with other provisions in the constitution. At the same time, some advisors, and foreign country representatives, seek to encourage the country to adopt their constitutional models, with little genuine understanding of the context and with little self-critical analysis of the weaknesses of the models they 'peddle'.

In summary, key paradoxes and compromises that are faced during constitution building processes include:

1) The tension between designing a constitution that achieves short term peace and one that achieves longer term peace and democracy, either because of the players at the table, the choice of provisions, or the still raw focus on the recent conflict or trauma;

2) The tension between urgently requiring some agreement and framework to allow the state to begin to function, and the problems created by rushed, or internationally driven processes;

3) The tension between inclusion and participation of the broad population in the state, and the goals and roles of the political and military elites;

4) The tension between creating a constitution that is aspirational and has a vision for the future, and one that is likely to be implemented and enforced;

5) The tension between opening up all issues for debate to encourage reconciliation and inclusion, and the process becoming divisive or inflamed, or no agreement being reached;

6) The tension between asking the general population what they want in a constitution and dealing with what you get in response, which might be irrelevant, unrealistic, or even counter-productive;

7) The tension between learning from international expertise and experiences and the need for local ownership and endogenous solutions to local problems.

**International Community involvement in Constitution Building**

Constitution building is an extremely complex and time consuming task with a range of challenges. International involvement in constitution building is increasing as constitution building is recognized as a core component of state building. It suffers from all of the problems of international state building, and a few additional ones as well. Despite initial optimism over the potential of the state-building approach, especially following Timor-Leste's admission into the United Nations as a new democracy in 2002, there is growing recognition that while there needs to be a focus on creating legitimate and sustainable state institutions, strategies to achieve this have not yet been fully developed. Common critiques to international state building include inadequate strategy and a lack of coordination, staffing weaknesses, and that funding is insufficient or poorly timed.[ii] Moreover, the unintended negative consequences of international

aid are more and more evident. These range from distortion of the economy to skewing relationship of accountability by the political elite towards internationals rather than domestic population.

In the case of constitution building similar problems arise. For instance, there is often a lack of coordination, with different donors, UN agencies, NGOs and advisors competing for access to the process and attention of the national actors during the constitution building process, undermining each other and confusing and distracting the national actors (eg Nepal). In Somalia, a helpful innovation was adopted: a consortium was formed, bringing together the donors, intergovernmental organizations and relevant NGOs, to develop a common strategy and funds base, to support the national actors.

In most other instances an *ad hoc strategy* of support has been adopted. This has also meant that there has often been insufficient financial support and a lack of timely planning. A participatory constitution building process requires a substantial amount of advance planning, from developing civic education material, developing and rolling out national dialogues, and undertaking a consultation process that often requires substantial travel to regions that are not easily accessible, and the organization of thousands of meetings. The budget that such processes require is also significant, in the millions of Euros, and is often underestimated. Moreover, the implementation phase is often ignored and not planned for, with international focus turning to other issues or other countries. In Afghanistan, for instance, the day after the adoption of the constitution by the Loya Jirga, the UN unit responsible for constitutional support was dissolved and refocused on other issues. This is typical and reflects a misperception that the constitutional document is of itself the goal of a constitution building process. In fact, drafting the document and adopting it, is only the very first step and most of the value of constitution building results from attempts to implement the document.

The international community has tended to fail to recognize that constitution building is a highly political process, rather than a technical drafting exercise, and that at its core it requires a process of consensus building. In this vein, the international community has had the tendency to encourage unduly short timelines and essentially rush the process of constitution making, often because of external factors rather than an assessment of the time required to engage in genuine consultation and consensus building (eg East Timor, Iraq). Moreover, the international community often seeks shortcuts in its involvement and interacts mainly with those that speak English or are more amenable to ideas that we are familiar with – leading to both an unbalanced perspective of the views of the population and resulting in choices which are divorced from the reality experienced by most of the population.

Finally, a key problem that arises in the context of international support to constitution building processes is that there is no particular training or qualifications required of those that become

international advisors to a process. This has meant that the advisors and experts brought in vary dramatically in their level of expertise and understanding of constitution building as a component of peace building and state building. Many are lawyers with primary experience in their home legislature and little comparative knowledge, or experience. Some have tried to sell or push options based on their own home model without genuinely engaging with the local context, or have undervalued the opportunities for peace building that derive from a genuine consultative process.

Finally, the sort of support and capacity building provided to constitution building processes has tended to focus on technical or legal advice and logistical support, and has overlooked the more intangible capacities which are actually fundamental to resulting in a positive outcome, namely leadership skills, communication skills, skills in conflict analysis, and skills in negotiation and debate. A constitution building process should be seen as a complex multi-stakeholder negotiation that must achieve an outcome that the great majority of the population believes is fair and just. In other words, as Howard Wolpe, has emphasized, the key to a constitutional process should be building collaborative capacity and building trust. However, mostly this element has been overlooked by the international community in its provision of support.

**Proposed Guiding Principles to Develop a Constitution Building Strategy**

Each constitution building process will be unique and the strategy adopted will need to be developed to suit the particular context. Nonetheless, some basic principles can be extracted from the experiences of constitution building that has been undertaken so far. These are my recommendations as a starting point to undertake the development of a constitution building strategy in a post-conflict, or transition to democracy context.

1) Recognition that constitution building is a national sovereign process, and that national ownership is crucial to legitimacy and sustainability of the outcome;

2) Recognition that the process by which the constitution is developed can be as important as the substance choices enshrined within it, and hence paying careful attention to the process elements, including the need for the provision of reasonable budgets if participative processes are chosen as appropriate to the context.

3) Humility from outsiders in advising about adopting particular options. It must be recognized that there are no simple solutions, and that "cut and paste" constitutions have not provided them, and hence the focus should be on providing comparative and non prescriptive support to national actors;

4) This also means that the process must be informed not by predetermined models, but rather by national and social contexts, realities and interests, and hence that we need to be open to

new models and local, home-grown solutions, and innovative strategies to ensure that the constitution is implemented and thus relevant in the complex contexts discussed;

5) Moreover, given the chasm that often opens between the text of the constitution and the reality, the focus on developing a constitution in such a context should be on real world implications and impacts, and not legalist or theoretical approaches; and hence, it is important to focus on what can be learnt from experiences from similar countries, in similar contexts, facing similar problems;

6) Expectation management regarding what the new constitution can achieve, and accepting that societal change is an incremental process which it may only be possible to undertake by recognizing the current situation (eg existence on informal processes) and building on it, is also key;

7) Recognition that the nature of the leadership and the ability of parties to undertake fruitful collaboration, consensus building, and negotiation are key to a successful constitutional building process, and hence recognition of the importance of supporting development of skills for building collaborative capacity and leadership in the preparation stage, in addition to supporting knowledge acquisition.

8) Recognition that whether a constitution is a success or a failure will depend on the implementation strategy developed, and hence that it is essential to prepare to support the implementation phase, including through the costing of the constitutional choices and the development of a systematic implementation strategy (such as capacity building for skills required to implement the constitution and programs to deepen understanding of the new constitution, in addition to the more traditional legislative implementation also required).